Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5877

JERRY LEANDER POE, Appellant

v.

THE STATE OF NORTH CAROLINA, Appellee

APPEAL FROM THE SUPREME
COURT OF NORTH CAROLINA

MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

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APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS APPEAL
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Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, appellee moves the Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth. In the alternative appellee moves the Court pursuant to Rules 16(c) of the Rules of this Court to affirm the judgment of the Supreme Court of North Carolina, and the opinion of the North Carolina Court of Appeals.

JURISDICTION

This is a direct appeal under 28 U.S.C. § 1257(2) from the Supreme Court of North Carolina, denying appellant's appeal upon a purported assertion of a substantial question arising under the Constitution of the United States, and simultaneously denying appellant's motion for discretionary review. The Order of the North Carolina Supreme Court is published at 298 N.C. 303, 259 S.E.2d 304 (1979). The Court of Appeals in an opinion published in 40 N.C.App. 385, 252 S.E.2d 843 (1979), affirmed the conviction for crime against nature under N.C.G.S. § 14-177. Appellant challenges the constitutionality of that criminal statute as it was applied to him.

STATEMENT

Poe was indicted for second degree rape and crime against nature. His case was tried to a jury at the January 30, 1978, Criminal Session of the Superior Court for Durham County, North Carolina. At the close of the State's evidence, the trial court dismissed the rape charge. The jury returned a verdict of guilty of crime against nature and the Court imposed a sentence of five years imprisonment.

At the trial, defendant moved for an instructed verdict of not guilty on the basis that all the evidence showed that the act of fellatio with which he was charged was committed with the voluntary consent of the prosecutrix. The trial court judge denied the motion. Defendant then sought instructions to the effect that if the jury should find that the prosecutrix voluntarily consented to perform the act of fellatio upon him, it should return a verdict of not guilty. The requested instruction was denied. When the jury returned a verdict of guilty of crime against nature, defendant moved to set aside the verdict and to arrest judgment on the ground that the evidence showed a consensual act of fellatio committed by adults of the opposite sex in private and therefore within the claimed zone of privacy protected by the Fourteenth Amendment of the United States Constitution. This was also denied and defendant entered notice of appeal to the North Carolina Court of Appeals.

The State's evidence at the trial showed and defendant admitted on the stand that an act of fellatio had occurred. The State and defendant differed though regarding the circumstances surrounding the act. The State's evidence tended to show that on November 4, 1977 Poe was riding in his car in Durham, North Carolina. He saw the prosecuting witness walking down a street in that city and he pulled his car over to the side of the road. (R pp 8, 9, 21, 22) She testified that he called her over to the car and asked her if she wished to make fifty dollars. She responded negatively but saw that he had a small black pistol under his coat. She said that he did not take it out from under his coat nor did he point it at her. (R pp 8,9) She did however get in the car and they rode to an old abandoned hoisery mill or warehouse in Durham. He parked the car and they went inside. (R pp 9, 22) There she committed the

act of fellatio upon him. (R pp 10, 11, 22) The prosecuting witness did not appear to be very intelligent. Poe called as a witness a psychiatrist, Dr. Andres Pumariega who testified that it was his impression that the prosecutrix did suffer from paranoid schizophrenia and that there was a possible sexual dimension to her paranoia. (R pp 25-26) In any event, the prosecutrix testified that she was fearful of the defendant and that she was afraid he might hurt her. She testified that Poe put his penis in her mouth; and that when he was through with her, he left her there at the warehouse. She copied down his license plate number and reported the incident to the police. (R pp 10-12)

Poe presented evidence that the prosecutrix had a reputation for promiscuity. Poe himself took the stand and gave his version of the incident. He claimed that it was the prosecutrix who initiated the encounter by flagging him down on the street and that she suggested that she would perform fellatio upon him since she was in her monthly period. (R p 22) He admitted taking her to the warehouse where she performed the act of fellatio upon him, (R p 22) but he denied using any force against her, threatening her, and having a gun on him. (R p 23) He said the act had continued for about two minutes when he heard a car outside the building. He pushed her away, zipped up his pants and went out to his car. She followed him and jumped in the back of his car. He told her to get out of the car, and she complied, slamming the door as she exited the vehicle. (R p 22)

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court, for the following reasons:

This Court has never held that the right of privacy in sexual relations extends beyond the bounds of marriage. In

GRISWOLD v. CONNECTICUT, 381 U.S. 479 (1965), it was held that the State could not outlaw the use of contraceptive devices by husband and wife because the right of privacy found in the Constitution precluded such an intrusion by the State into the marital bedroom. The opinion of the Court and the concurring opinions are replete with references to the marital relationship. See e.g. 381 U.S. at 480, 481, 485, 486, 487, 495, 496, 503 and 505. The Court in GRISWOLD did not purport to find in the Constitution a barrier to governmental regulation of all sexual relationships. Mr. Justice Goldberg in his concurring opinion emphasized the decision as announced

> ...in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in POE v. ULLMAN, supra, 367 U.S. [497] at 553, 6 L.Ed.2d at 1025,
>
> > "Adultry, homosexuality and the like are sexual intimacies which the State forbids...but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality...or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of criminal law the details of that intimacy."

381 U.S. at 498, 499.

EISENSTADT v. BAIRD, 405 U.S. 438 (1972) did not extend the right of privacy in sexual matters to unmarried persons. Rather the Court in that decision held that "...[a person's] decision to bear or beget a child" was protected by the constitutional right of privacy. 405 U.S. at 453. The opinion deals with procreation specifically, not sexual relations generally, and holds that "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication." 405 U.S. at 448. Thus the Court has held nothing more than that the right of privacy protects the individual in taking precautions to prevent pregnancy.

ROE v. WADE, 410 U.S. 113 (1973), DOE v. BOLTON, 410 U.S. 179 (1973), PLANNED PARENTHOOD OF CENTRAL MISSOURI v. DANFORTH, 428 U.S. 52 (1976), and other abortion cases in no manner support Poe's contention that the constitutional right of privacy precludes state regulation of sexual activity between consenting heterosexual adults. Those cases quite simply define to what extent the State may regulate a woman's decision to terminate her pregnancy and the manner in which the pregnancy may be terminated. Mr. Justice Blackmun in ROE v. WADE, supra at 152, 153, lists those cases which have touched upon the right of privacy and demonstrates that the Court has never enunciated a broad right of privacy, protecting all intimate relationships. Nor is the right of privacy a talisman which when displayed bars all government action with respect to the activity in question. Cf. WHALEN v. ROE, 429 U.S. 589, 597 (1977), in which Mr. Justice Stewart stressed in his concurring opinion at 607, 608 that "there is no 'general constitutional "right to privacy." ...[T]he protection of a person's general right to privacy is, like the protection of his property and of his very life, left largely to the law of the individual state.' ...[KATZ v. UNITED STATES, 389 U.S.] at 350-351."

STANLEY v. GEORGIA, 394 U.S. 557 (1969), has been cited for the broad proposition that in the privacy of his home, a man may do some things which if performed publicly would be illegal. As a general proposition this statement is of course true. However, the precise holding of the case is much narrower. As Mr. Justice Stewart pointed out in his concurring opinion in WHALEN, supra, 429 U.S. at 609, notwithstanding STANLEY's references to the right to read pornographic literature in the privacy of one's home, that case "simply [holds] that the First Amendment -- as made applicable to the States by the Fourteenth -- protects a person's right to read what he chooses in circumstances where that choice poses no threat to the sensibilities or welfare of others..."

See also PARIS ADULT THEATER I v. SLAYTON, 413 U.S. 49 (1973), in which Mr. Chief Justice Burger noted the limited nature of the right of privacy, which "encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." 413 U.S. at 65.

This Court has held that a state criminal statute using the language "crime against nature" does not violate the Constitution even if construed by State courts broadly enough to include the sort of sexual conduct in which Poe engaged. WAINWRIGHT v. STONE, 414 U.S. 21 (1973). The Court has also held that a person may be prosecuted for performing or engaging in certain sexual acts which may reasonably have been understood to be prohibited by and included within a statute using the term "crime against nature." This is permissible even though no previous appellate court decision has specifically found the act in question to be covered by state statute. ROSE v. LOCKE, 423 U.S. 48 (1975).

Poe seems to argue that the right of privacy includes not only the right of two consenting adults of opposite sex to engage in sexual relations, but also to engage in whatever sexual act they see fit as long as they do so in secrecy. He further contends that this right is a fundamental one that can only be invaded by the State upon a showing of a compelling interest. As demonstrated above, these contentions are not supported by the decisions of this Court. In EISENSTADT v. BAIRD, supra, which declared that the right of privacy did include an unmarried woman's right to obtain contraceptives, the Court held that the right was not among those so fundamental that the State must prove a compelling interest in order to intervene. 408 U.S. 447 n 7. Moreover, in ROSE v. LOCKE, supra, 423 U.S. at 50 n 3, the Court expressly declared that no fundamental right was involved in a prosecution for an act of cunnilingus. If no fundamental right was involved in that act, there is certainly none in the act of fellatio.

Poe's claim that the consent of the partner provides a constitutional shield to engage in acts otherwise forbidden must also fail. Mr. Chief Justice Burger, writing for the Court in PARIS ADULT THEATER I. v. SLAYTON, supra, answered this contention: "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take." 413 U.S. at 68. Furthermore, this Court has summarily affirmed a three-judge district court opinion holding constitutional a Virginia statute making sodomy a crime even when the act was engaged in by two consenting adult males in private. DOE v. COMMONWEALTH ATTORNEY, 425 U.S. 901 (1976), aff'g 403 F.Supp. 1199 (E.D. Va. 1975).

If the act of sodomy may lawfully be forbidden between consenting males, a consensual act of fellatio may also be forbidden between an unmarried adult male and an unmarried adult female. The argument that it is a denial of equal protection to subject an unmarried man and woman to criminal prosecution for conduct which cannot be prosecuted if committed by a married couple in private is wholly specious.[1] It is the marriage which enjoys protection; the sexual conduct in and of itself is simply secondary.

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[1] The fact that public opinion may not conform with the statutory proscription is a matter for the legislature, not the courts. See FERGUSON v. SKRUPA, 372 U.S. 726, at 730, and Mr. Justice Stewart's dissenting opinion in GRISWOLD v. CONNECTICUT, supra, 381 U.S. at 527. However, if even beyond the historical revulsion felt by society at the sexual acts included under the term "crime against nature" there is also medical evidence that such conduct may be conducive to the spread of disease. See "Sexual Transmission of Hepatitis A in Homosexual Men," The New England Journal of Medicine, 1980; 302: 435-438.

As Mr. Justice Douglas noted in GRISWOLD v. CONNECTICUT, 381 U.S. at 485, 486: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Thus, that which may be performed within the bonds of marriage may lawfully be banned outside of that protected relationship.

CONCLUSION

For the foregoing reasons, either the appeal should be dismissed or the opinion of the North Carolina Court of Appeals should be affirmed.

Respectfully submitted,

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